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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

[Protest of Corps of Engineers Contract Award]

FILE: B-196346

DATE: February 20, 1980

MATTER OF: Kamex Construction Corporation *DLG03929*

DIGEST:

1. Incorrect certification that bidder was small disadvantaged business concern is minor informality where solicitation was small business set-aside and not section 8(a) small disadvantaged business set-aside.
2. Allegation that bidder's acknowledgment of receipt of amendments which states issue date of solicitation instead of later issue dates of amendments means that bidder received amendments before any other bidder is conjectural and protester has not met burden of proof.
3. Bidder can bind itself to contents of amendment merely by acknowledging receipt thereof in solicitation where no other response is required from bidder.
4. Protest alleging bidder is unable to meet engineering electronic specifications is dismissed, since question involves bidder responsibility, affirmative determination of which is not reviewed by GAO, except in limited circumstances not present here.
5. There is no prohibition against submitting bid with prices "hastily" handwritten when remainder of bid is typed.
6. Even if determination to make award prior to resolution of protest is contrary to DAR § 2-407.8(b)(3)(iii) (1976 ed.), legality of award is not affected. Burden is on protester to present evidence necessary to substantiate case and GAO does not conduct investigations incident to protest to establish validity of protester's bare statements.

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Kamex Construction Corporation (Kamex) protests the award of a contract to Able Associated Enterprises Inc. (Able) under invitation for bids (IFB) NO. DACW27-79-B-0098 issued by the Corps of Engineers (Corps). The IFB was a small business set-aside for the installation of a centralized control and surveillance system for the Newburgh Locks and Dam on the Ohio River. DLG03930
AGC00305

Kamex alleges that Able incorrectly certified in its bid that it was a small disadvantaged business concern. It is Kamex's position that the erroneous certification disqualifies Able's bid. In addition, Kamex questions Able's acknowledgment in the bid of the receipt of amendments 1 through 3, because the acknowledgment lists August 24, 1979, the wrong date, for each of the amendments. Kamex contends this means either Able received all three amendments at the same time and before the other bidders or Able "acknowledged the amendments without actually receiving them or incorporating them into their bid." Consequently, Kamex believes Able's bid is nonresponsive. In support of this, Kamex calls attention to some other situations where bids submitted to the Corps were rejected for failure to acknowledge amendments. Further, Kamex submits that Able is unable to meet the IFB's engineering and electronic specifications. In this regard, Kamex states that Diamond Electronics is the only company whose electronic components will satisfy the IFB's specifications and that Able did not obtain a proposal from Diamond prior to bid opening. Also, Kamex states that there was confusion at the bid opening in that the person opening the bids explained that a mistake must have been made. Kamex believes that this, in conjunction with the fact that the prices on Able's bid were "hastily" written while the remainder of the bid was typed, raises questions concerning the bid opening and Able's bid. Finally, Kamex objects to the Corps' award of a contract to Able while the protest was pending in our Office. Kamex requests that we investigate "the entire proceedings surrounding the bid and solicitation."

For the reasons that follow, Kamex's protest is dismissed in part and denied in part.

The procurement in question is a small business set-aside conducted under the small business restricted advertising procedure and is not a section 8(a) small disadvantaged business set-aside. Compare Defense Acquisition Regulation (DAR) § 1-706.5 (1976 ed.), amended by Defense Acquisition Circular (DAC) 76-19, July 27, 1979, with DAR § 1-705.5 (1976 ed.), amended by DAC 76-19, July 27, 1979. The award procedure for small business restricted advertising is the same as that for formal advertising, except that the award is restricted to small business concerns. DAR § 1-706.5(b) (1976 ed.), amended by DAC 76-19, July 27, 1979. Therefore, an award under a small business set-aside is made to the lowest responsible small business bidder who submits a responsive bid.

Under the small business restricted advertising procedure, it is not necessary that the small business concern be a disadvantaged business concern. Thus, it does not matter whether the bidder has that status. Therefore, the certification has no bearing on the promise of performance under the contract and is not relevant. In a similar vein, we have held that an incorrect statement in a bid as to business affiliation does not represent a fatal defect in the bid. B-159966, February 23, 1967. In the circumstances, it is clear that Able's erroneous certification was waiveable as a minor informality, defined as "merely a matter of form * * * having no effect * * * on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders." DAR § 2-405 (1976 ed.).

With respect to Able's acknowledgment of the receipt of the three amendments, while Able specified in the acknowledgment that each is dated August 24, 1979, when they actually are dated August 27, September 12 and September 13, respectively, it does not follow that Able necessarily received the amendments before any other bidder. It is entirely possible that Able inadvertently copied the issuance date of the IFB, which was August 24, instead of the amendment dates. There is some support for that view inasmuch as in submitting its bid Able used the bid form which was furnished with amendment 2, dated September 12, 1979, and the bid form is

stamped as received by Able on September 14, 1979. Therefore, we consider Kamex's allegation to be conjectural. The protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc., --Request for Reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Under the circumstances, it is our view that Kamex has not met the burden of proof.

Moreover, assuming Able acknowledged the amendments without receiving them or incorporating them into its bid, that would not affect the responsiveness of the Able bid. If any bidder acknowledged an amendment without considering its content, it would still be bound to perform in accordance with the amendment. A bidder can bind itself to the contents of an amendment merely by acknowledging receipt where no other response is required from the bidder. See Ventura Manufacturing Company, B-193258, March 21, 1979, 79-1 CPD 194. This is different from a situation where a bidder fails to acknowledge an amendment. There the bidder would not be legally obligated to perform in accordance with the amendment.

Kamex's allegation that Able is unable to meet the IFB's engineering electronic specifications is a matter of responsibility. See e.g., Airtronics Inc., B-192400, August 4, 1978, 78-2 CPD 90. A contracting officer's decision to award a contract to a particular bidder would necessarily involve an affirmative determination of that bidder's responsibility. Our Office does not review protests of affirmative determinations of responsibility unless fraud on the part of the procuring officials is alleged or the solicitation contains definitive responsibility criteria which allegedly have not been applied. American Mutual Protective Bureau, B-194953, June 21, 1979, 79-1 CPD 447. Neither exception is applicable here. Therefore, this aspect of Kamex's protest is dismissed.

While Kamex contends that the "hastily" written prices on Able's bid raise questions about the bid, we know of no prohibition against submitting a bid with the prices handwritten when the remainder of the bid is typed. Moreover, in response to Kamex's allegation of confusion at the bid opening, the Corps has submitted affidavits from the three Corps employees who presided over the bid opening. Each employee denies

that a statement mentioning any mistake was made. In addition, the affidavits state that there was a "slight pause" after reading Overdahl Construction Company's bid since Overdahl reduced its bid by wire and the reduction had to be calculated before the total bid could be read.

Kamex also has objected to the Corps' decision under DAR § 2-407.8(b)(3)(iii) (1976 ed.) to award the contract to Able prior to the resolution of the protest. Kamex questions whether the need for a prompt award was as compelling as the Corps found it to be. However, even if the award is contrary to the cited DAR, the legality of the award is not affected. Starline, Incorporated, 55 Comp. Gen. 1160, 1172 (1976), 76-1 CPD 365.

In regard to Kamex's suggestion that there may be improprieties in "the entire proceedings surrounding the bid and solicitation" and that our Office conduct an investigation to ascertain the validity of the suggestion, we point out that the burden is on the protester to present the information and evidence necessary to substantiate its case and it is not our practice to conduct investigations incident to a bid protest to establish the validity of a protester's bare statements. Courier-Citizen Company, B-192899, May 9, 1979, 79-1 CPD 323; Tri-States Service Company, B-195642, January 8, 1980, 80-1 CPD _____.

The protest is dismissed in part and denied in part.



Deputy Comptroller General
of the United States